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No.

IN THE

Supreme Court of the United States

October Term, 1984

AVTEX FIBERS, INC.,

Petitioner

v.

ROBERT L. MCDOWELL,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a "willful" violation of the Age Discrimination in Employment Act, and thus an entitlement to liquidated damages, may be established pursuant to a legal standard which requires no evidence that the defendant intentionally or recklessly violated the Act?[1]

2. Whether the Court of Appeals erred in holding that pension benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?

3. Whether the Court of Appeals erred in holding that unemployment compensation benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?

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1. In February 1984, this Court granted certiorari on the issue whether specific intent to discriminate is necessary to establish "willfullness" (and thereby entitle plaintiff to an award of liquidated damages) under the ADEA. *Trans World Airlines, Inc. v. Thurston*, No. 83-997, *cert. granted*, ___ U.S. ___, 104 S. Ct. 1412 (1984). That case has been consolidated with *Air Line Pilots Association, International v. Thurston*, No. 83-1325, *cert. granted*, ___ U.S. ___, 104 S.Ct. 1706 (1984). Oral argument is scheduled for October 9, 1984.

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AVTEX FIBERS, INC.,

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ROBERT L. MCDOWELL,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Avtex Fibers, Inc.[2] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 12, 1984, affirming in part and reversing in part the judgment of United States Magistrate William F. Hall, Jr.

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2. All the parties to this case are listed on the cover caption of this Petition. Pursuant to Supreme Court Rule 21.1(b), Avtex states that it is a subsidiary of AVI Holding Corporation; that the other subsidiary of AVI Holding Corporation is Nitro Leasing Corporation; and that Avtex has a wholly-owned subsidiary, Avtex Fibers — Front Royal, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is unofficially reported at 35 Fair Empl. Prac. Cas. (BNA) 371, and appears in Appendix "A" beginning at page A-1. The opinion of United States Magistrate William F. Hall, Jr. is not reported. It appears in Appendix "B" beginning at page A-13.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1984. This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 4(a) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a), provides:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

Section 7(b) of the Age Discrimination in Employment Act, 29 U.S.C. §626(b), provides:

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures

provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§216, 217): Provided, that liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

Introduction

This Petition arises from an action brought by Robert L. McDowell against Avtex Fibers, Inc. ("Avtex") under the Age Discrimination in Employment Act ("ADEA"). The jury found Avtex liable. After Avtex agreed to reinstate McDowell, the trial court exercised its discretion to establish back pay damages by first calculating the amount of salary and benefits McDowell lost as a result of his termination and then deducting, among other things, pension benefits and unemployment compensation benefits paid to McDowell. The trial court also awarded liquidated damages in an amount equal to the back pay award.

Avtex appealed from that portion of the order awarding liquidated damages, arguing that the trial court applied an incorrect legal standard in finding Avtex' violation to have been willful and that, in any event, the evidence was insufficient to support a finding of willfulness. McDowell cross-apppealed, challenging the deduction by the trial court of pension plan benefits and unemployment compensation benefits from his back pay award.

The Third Circuit affirmed the award of liquidated damages to McDowell, holding that liquidated damages are appropriate if the employee proves that he was discharged "because of age and that the discharge *was voluntary and not accidental, mistaken, or inadvertent.*" (A-22; emphasis in original). The trial court had found "no basis for concluding that the plaintiff's discharge was not voluntary and that it was accidental, mistaken or inadvertent." (A-7).

The Third Circuit further held that McDowell's back pay award must be increased in two respects. First, it held as a matter of law that the ADEA did not permit the trial judge to deduct from the back pay award the pension benefits paid to McDowell by Avtex after his termination. Second, the Third Circuit held as a matter of law

that the ADEA permitted Avtex no credit against the back pay award for unemployment compensation benefits McDowell received after his termination. In reversing the trial court's decision to make these deductions for pension and unemployment compensation benefits, the Third Circuit in effect determined that the trial court lacks discretion under the ADEA to deduct these items from back pay awards.

Factual Background

Avtex manufactures and sells rayon, polyester and acetate fibers. Avtex once operated five manufacturing plants, but in late 1979 and early 1980 was forced to close two of its plants, in Virginia and West Virginia, because of poor business conditions. Avtex laid off all 1,350 manufacturing employees at those facilities, and made proportionate reductions elsewhere in support staff. McDowell conceded at trial that the reduction was required by poor business conditions in the fiber markets and the economy in general. Before the layoffs, McDowell was a research chemist with Avtex' Research & Development Department in Front Royal, Virginia. The Department consisted of thirty professional employees and twenty-eight technicians. McDowell's supervisor, Mr. Hettich, was instructed by Avtex management to reduce the Department's staff by seventeen employees (J.A. 174-75).[3] Accordingly, nine professionals and eight technicians were terminated.[4] Hettich testified that he ter-

3. References to the parties' Joint Appendix filed in the Third Circuit appear as "J.A. ".

4. *Before* the reduction-in-force, seventy-three percent of the professional employees in the Department were older than fifty years of age (J.A. 194). *After* the reduction-in-force, seventy-one percent of the professional employees in the Department were older than fifty (J.A. 195). Viewing the Department as a whole, both professionals and technicians, fifty-three percent of *all* employees were older than fifty years of age *before* the reduction-in-force, while fifty-four percent of the *retained* employees were older than fifty.

minated McDowell because the bulk of McDowell's work was in research and product development, two areas which Avtex decided to cut back (J.A. 175-76, 178). Hettich further testified that McDowell did not fully understand cost and budget procedures (J.A. 152); did not adequately communicate with his superiors about the planning and progress of his work (J.A. 152, 157); had acted without Hettich's approval in committing Avtex to a secrecy agreement (J.A. 161); and had refused management's request that he assist in the installation of an experimental laboratory (J.A. 169-73).

McDowell thereafter filed suit against Avtex alleging that his discharge violated the ADEA. The case was tried before United States Magistrate William F. Hall, Jr. pursuant to the parties' stipulation under 28 U.S.C. §636(c), which permits federal magistrates, with the parties' consent, to try both jury and non-jury cases and to enter final judgments appealable directly to the Court of Appeals.

The liability issue was submitted to a jury. McDowell openly conceded that he had no direct evidence that he was discriminated against by age (J.A. 37); he produced no evidence that Hettich was aware that he was discriminating by age in terminating him. The inferential evidence adduced by McDowell was as follows: First, McDowell's statistician testified that there was a statistically significant relationship between the ages of the older employees and the chance that they would be terminated. Avtex' statistician, using a different statistical test, disagreed. Neither expert testified that the statistical test used by the other was inappropriate. Both opinions went to the jury. Second, McDowell attempted to show that three younger retained employees were less valuable to the Department than he was. Third, McDowell introduced salary increase forms for two younger employees. One referred to the employee as having "good potential" and the other referred to the employee as "one of the very few bright young men in our department."

(J.A. 105-06). McDowell's counsel suggested in her examination of Hettich that these comments evidenced his "unconscious preference for youth" (J.A. 103-06), and emphasized repeatedly in her closing statement that Hettich unconsciously discriminated against McDowell because of his age (J.A. 61-65).

The jury returned a verdict that Avtex had violated the ADEA in terminating McDowell. The jury made no determination concerning the willfulness of that violation. Upon stipulation by the parties, the issues of damages, liquidated damages and other relief were then submitted to Magistrate Hall.

After the verdict, on Avtex' initiative (A-8 through A-11), McDowell was reinstated to his former position with Avtex, with a salary reflecting the raises he would have been eligible to receive in the period since his termination, and with full pension and other benefits as though he had never been terminated.

The Trial Court's Damage Calculation

McDowell having been reinstated, the remaining remedial issues were submitted to Magistrate Hall. Magistrate Hall entered an Order awarding McDowell $47,593.01 in back pay and benefits, and an equal amount as liquidated damages (A-7).

In calculating the amount necessary to make McDowell whole, Magistrate Hall totalled the amount of salary and benefits McDowell would have earned had he not been terminated. From that amount, Magistrate Hall first deducted McDowell's termination and vacation pay, and the amounts McDowell had earned from other employment after his termination (A-2). McDowell did not object to these deductions.

Magistrate Hall next deducted the pension payments McDowell had received after his discharge, finding that McDowell would not have received those amounts ex-

cept for his discharge[5] (A-3).

McDowell had also received certain unemployment compensation benefits after his termination. The parties stipulated that those payments were made in part from the state unemployment funds of Virginia and Pennsylvania, and in part by the United States Government pursuant to the Trade Act of 1974, 19 U.S.C. § 2101 *et seq*. Finding that the deductibility of unemployment compensation benefits was a matter committed to his discretion, Magistrate Hall deducted from McDowell's back pay award the benefits paid from the state unemployment funds to which Avtex had contributed, but not the payments made pursuant to the Trade Act.

The foregoing computation resulted in a back pay award of $47,593.01 (A-5).

With respect to McDowell's request for liquidated damages, Magistrate Hall relied on *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3rd Cir. 1980), in which the Third Circuit, in addressing the proof necessary to support an award of liquidated damages, concluded that "[i]t is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken or inadvertent" (A-6). Magistrate Hall first found that the jury's verdict on liability established that McDowell was discharged because of age[6] (A-7). Turning to the second part of the *Wehr* test and applying it literally, Magistrate Hall found "no basis for concluding that the plaintiff's *discharge* was not voluntary and that it was accidental, mistaken or inadvertent." (A-7) (emphasis added). The trial court therefore concluded that McDowell was entitled to liquidated damages.

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5. The parties stipulated that the Avtex pension plan is wholly funded by Avtex.

6. The ADEA makes it unlawful for an employer to "discharge any individual . . . because of such individual's age." 29 U.S.C. § 623 (a) (1).

Avtex appealed the liquidated damages determination, contending that the standard applied by the magistrate made liquidated damages automatic upon a finding of liability because all *discharges* are voluntary. McDowell cross-appealed, arguing that the magistrate erred in deducting his pension and unemployment compensation benefits from the award of back pay.

The Third Circuit's Decision

The Third Circuit affirmed the award of liquidated damages and reversed the deductions of pension and unemployment compensation benefits from back pay.

On the liquidated damages issue, the Court approved the standard used by Magistrate Hall and the manner in which it was applied (A-21-24). The Court did not address Avtex' argument that, to recover liquidated damages, a plaintiff must show that the employer intentionally, or at least recklessly, violated the ADEA. The Third Circuit has thus adopted a legal standard by which liquidated damages are automatic upon a finding of liability, even if the discrimination is unconscious or unintentional. This is the most liberal of a perplexing array of standards for "willfulness" that have been articulated in the Circuits.

The Third Circuit held that the pension payments made to McDowell after his termination may not, as a matter of law, be deducted from the back pay award. The Court termed pension benefits "indistinguishable [from unemployment compensation benefits] for purposes of deciding this case", and characterized them as "collateral benefits" to McDowell, notwithstanding that Avtex was the sole contributor to the pension fund and the parties had agreed that McDowell's pension account would be restored to the level it would have achieved had McDowell never been discharged or received post-termination benefits (A-19-21). No court had ever before held that post-termination pension benefits may not be deducted from

a back pay award where the plaintiff's pension plan is fully restored.

On the question whether Avtex was entitled to a credit against the back pay award for the unemployment compensation benefits received by McDowell after his discharge, the Third Circuit became the first Court of Appeals to hold that the trial judge lacks the discretion under the ADEA to deduct such benefits.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE COURTS OF APPEALS AS TO WHAT CONSTITUTES A "WILLFUL VIOLATION" OF THE ADEA

Introduction

The ADEA provides that liquidated damages are payable "only in cases of willful violations of this Act." 29 U.S.C. §626(b). The term "willful" is not defined in the ADEA, and the Circuits have reached different conclusions as to the meaning of that term. This Court has already recognized the conflict among the Circuits by granting certiorari in *Trans World Airlines, Inc. v. Thurston*, No. 83-997, *cert. granted*, ____ U.S. ____, 104 S.Ct. 1412 (1984)[7] on the issue "whether specific intent to discriminate is necessary to establish willfulness" under the ADEA.

The Statutory Language

Section 4(a) of the ADEA makes it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. §623(a). This prohibition is

7. That case has been consolidated with *Air Line Pilots Association, International v. Thurston*, No. 83-1325, *cert. granted*, ____ U.S. ____, 104 S. Ct. 1706 (1984). Oral argument is scheduled for October 9, 1984.

enforced by express incorporation of the remedial rights and procedures of the Fair Labor Standards Act ("FLSA"), with certain specific exceptions. 29 U.S.C. §626(b) (incorporating 29 U.S.C. §§211(b), 216(b) and 216(c) and 217 of the FLSA). One of those exceptions involves the award of liquidated damages.

The FLSA provides for the recovery of liquidated damages equal to the pecuniary losses sustained by the employee by way of lost wages, salary increases, and other benefits. 29 U.S.C. §216(b). The award of liquidated damages is automatic for a violation of the FLSA. *See, e.g., Barcelona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). *Cf. Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 216-17 (4th Cir. 1982); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 (7th Cir. 1981). Section 7(b) of the ADEA, however, authorizes the award of liquidated damages "*only* in cases of willful violations." 29 U.S.C. §626(b) (emphasis added). By authorizing the award of liquidated damages only in cases of willful violations, and thereby departing from the automatic award of those damages under the FLSA, Congress clearly intended to create two levels of liability under the ADEA: non-willful and willful. In *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), this Court observed that "while incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded *only* where the violation of the ADEA is *willful.*" (Emphasis added). *See also Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) ("the legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination towards an individual was quite possible").

Standards for Willfulness in the Circuits

This Court has recognized that "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). The Circuits have reached different conclusions as to the meaning of "willful" in the context of the ADEA.

Some Circuits have interpreted "willful" to require awareness on the part of the employer that its actions are in violation of the ADEA. For example, the First Circuit has concluded that an act is "willful" if done "voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). The Seventh Circuit has adopted a similar interpretation, concluding that "willfulness" should be found "only if there is some showing as to the defendant's knowledge of the illegality of his actions." *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981).

The Sixth Circuit has held that a violation is willful only if the employer "acted deliberately, intentionally and knowingly in firing the plaintiff because of his age." *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983). It is not necessary, in order to establish willfulness, to prove that the employer was aware of the implications of his actions under the ADEA. *Id.* The Ninth Circuit has adopted virtually the same standard. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981).[8]

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8. The Sixth and Ninth Circuits believed that they were adopting the standard for willfulness articulated by the Third Circuit in *Wehr v. Burroughs*, 619 F.2d 276 (3d Cir. 1980). *See Blackwell*, 696 F.2d at 1183-84; *Kelly*, 640 F.2d at 980. The Second Circuit has also interpreted *Wehr* to require a knowing and voluntary violation of the ADEA. *See Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981). In fact, the *Wehr* opinion does contain language suggesting that liquidated damages should be awarded only for intentional vi-

The Fifth Circuit deems a violation willful if "the employer is aware that his actions are governed by the [ADEA]", but permits reduction or elimination of the award if the Court finds that the employer's actions were in good faith and the employer had reason to believe its conduct did not violate the ADEA. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981).[9] The Fourth and Tenth Circuits have adopted the same standard, but without the "good faith" exception. *EEOC v. Prudential Federal Savings and Loan Association*, ____ F.2d ____, 35 Fair Empl. Prac. Cas. (BNA) 783, 790 (10th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982).

The Second Circuit requires the employee to show that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *cert. granted sub nom., Trans World Airlines, Inc. v. Thurston*, No. 83-997, ____ U.S. ____,

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olations. *See Wehr*, 619 F.2d at 283 "[The term 'willful'] . . . applies to violations which are intentional, knowing or voluntary . . . ." The language of the *Wehr* Court applied by the trial court and approved by the Third Circuit in the present case, however, was as follows:

> "It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent." 619 F.2d at 283.

This standard does not require an intentional *violation*, but only an intentional *act* that is later found to be discriminatory. *Kelly, Blackwell* and *Goodman*, therefore, apparently misinterpreted *Wehr*.

9. This "good faith" standard is rooted in the Fifth Circuit's holding that Section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. §260, which amends the enforcement provisions of the FLSA incorporated into the ADEA, is itself incorporated into ADEA. *See Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976). The other Circuits that have considered the question whether the Section 11 good faith standard applies in ADEA cases have held to the contrary. *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979).

104 S. Ct. 1412 (1984). The Court emasculated that standard, however, by going on to hold that "[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." 713 F.2d at 956 (emphasis in original).

In the present case, the Third Circuit had adopted a standard for willfulness which requires merely that the actions of the employer be voluntary and not accidental, mistaken, or inadvertent:

> "It is sufficient to prove that the company discharged the employee because of age and that the *discharge was voluntary and not accidental, mistaken, or inadvertent.*" Opinion of the Court below (A-23), quoting from *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980) (emphasis in original).[10]

Consequently, once an employee shows that his discharge was voluntary, the employee is entitled to liquidated damages, as a matter of law, without any evidence that the employer knew, or recklessly disregarded, whether its actions were violative of the ADEA. Since discharges are voluntary in nature, and not accidental, mistaken or inadvertent, this standard eliminates any meaningful distinction between willful violations of the ADEA and violations that are not willful. This standard appears to lead to an automatic award of liquidated

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10. The Third Circuit went on to state an alternative test: "In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences." Opinion of the Court below (A-22), quoting from *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). Since the award of liquidated damages will be automatic in nearly every case of age discrimination, under the test quoted in the text, it is hard to imagine a case of age discrimination which would call for application of the test quoted in this footnote. Thus, at the trial level in this case, Magistrate Hall found it necessary to apply only the first test.

damages, even though Congress chose statutory language indicating that the award of liquidated damages was to be the exception and not the rule:

> "*Provided*, that liquidated damages shall be payable *only* in cases of *willful* violations of this Act." 29 U.S.C. §626(b) (emphasis added).

This Court has recognized that in enacting the ADEA "Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons, supra*, 434 U.S. at 581. With respect to the remedial provisions of the FLSA, Congress chose to depart from the automatic award of liquidated damages by providing that such damages shall be payable "only in cases of willful violations." The Third Circuit, however, has adopted a standard for willfulness that virtually reads this statutory language out of the ADEA, in contravention of the principle that a statute " 'ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void or insignificant.' " *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). A better standard for "willfulness" is that the employer act with knowledge that (or at least reckless disregard as to whether) its actions violate the ADEA. This standard will preserve a meaningful distinction between willful and non-willful violations of the ADEA.

The Legislative History

The legislative history of the ADEA shows that Congress intended to draw a meaningful distinction between willful and non-willful violations, so that the award of liquidated damages would be the exception and not the rule. The original bill made it a crime to willfully commit any practice made unlawful by the bill. That criminal provision was eliminated, however, and replaced by the

current provision authorizing the award of liquidated damages in cases of willful violations. In explaining the elimination of criminal penalties, Senator Javits made it clear that liquidated damages were intended to serve as a penalty (without the higher standard of proof associated with criminal penalties):

> "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. *This will furnish an effective deterrent to willful violations* and at the same time avoid the difficult problems of proof which would occur under a criminal provision." 113 Cong. Rec. 7076 (1976) (emphasis added).

As the Fifth Circuit has recognized, "it is quite apparent that Senator Javits . . . held the view that liquidated damages could effectively supply the deterrent and punitive purposes which both criminal penalties and punitive damages normally serve." *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See also Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Smith and Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980). Generally, to recover punitive damages, there must be "circumstances of aggravation or outrage, such as spite or 'malice' or a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." W. Prosser, *The Law of Torts* §15 at 9-10 (4th Ed. 1971) (footnotes omitted). The standard for willfulness articulated by the Third Circuit, which requires no evidence that the employer knew or recklessly disregarded whether his actions were prohibited, is incompatible with the punitive purpose of liquidated damages. *See, e.g., Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893)

("guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages").

The legislative history also shows an awareness by Congress that a violation of the ADEA may arise from unconscious age discrimination. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981). Indeed, a number of Circuits have recognized that a violation of the ADEA may arise from unconscious discrimination because of age. *See, e.g., Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); *Smith v. University of North Carolina*, 632 F.2d 316, 337 (4th Cir. 1980); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983). Yet under the standard for willfulness articulated by the Third Circuit, unconscious discrimination will constitute a willful violation, so long as the actions of the employer were voluntary and not accidental, mistaken, or inadvertent.[11] Clearly Congress did not intend to subject employers to punitive penalties, in the form of liquidated damages, in cases of unconscious discrimination. As the Seventh Circuit properly concluded in *Syvock v. Milwaukee Boiler Mfg. Co., supra*, 665 F.2d at 155:

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11. In appealing to the Third Circuit, Avtex contended not only that the trial court had applied an incorrect legal standard, but also that the evidence in this case was insufficient to support a finding of "willfulness" under the ADEA. The Third Circuit's Opinion in this case, after concluding that the trial court applied the correct legal standard for liquidated damages, goes on, in footnote 6 (A-23), to cite certain items of evidence and to state: "We believe this evidence is sufficient to support a finding of willfulness."

The evidence in question, however, has never been evaluated by a fact finder pursuant to a legal standard which requires any inquiry into defendant's state of mind. Beyond that, Avtex continues to maintain that a finding of "willful violation" *cannot* be made in this case. The evidence cited in the Third Circuit's footnote 6 (A-23), upon analysis, is the kind of inferential evidence which could support a liability verdict. But there is no evidence — and the Third Circuit cites none — which even implies a willful violation of the law.

> "[The standard for willfulness] must distinguish those situations in which an employer consciously discriminates against an employee because of age from those in which the discrimination is unconscious. This distinction is just as necessary in disparate treatment cases as it is when the plaintiff sues on a discriminatory impact theory. We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions" (footnote omitted).

In sum, the standard for willfulness articulated by the Third Circuit in the present case is contrary to the statutory language and legislative history of the ADEA, and is inconsistent with the standards adopted by other Circuits. In light of the conflict among the Circuits, and the importance of the ADEA in civil rights litigation, certiorari should be granted in this case.

II. THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING THE POWER OF THE DISTRICT COURTS TO DEDUCT PENSION AND UNEMPLOYMENT COMPENSATION BENEFITS FROM BACK PAY AWARDS IN APPROPRIATE CASES

This case presents the Court with the opportunity to provide the lower courts and the business community with much-needed guidance as to how damages should be ascertained for a violation of the ADEA. The Third Circuit's unprecedented ruling that trial courts have no discretion to allow deductions against back pay for pension and unemployment compensation benefits received by a terminated employee violates Congress' intentions as expressed in Section 7(b) of the ADEA, 29 U.S.C. §626(b), and conflicts with all previous judicial interpretations of that provision.

The remedial provision of the ADEA, Section 7(b), provides in pertinent part:

> "In any action brought to enforce this Act, *the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act* . . . ." 29 U.S.C. §626(b) (emphasis added).[12]

Courts have repeatedly emphasized that awards under this provision should make the plaintiff "whole." *See, e.g., Cline v. Roadway Express, Inc.*, 689 F.2d 481, 490 (4th Cir. 1982) (the "ordering equitable principle is that a conpensatory back pay award should only make the wrongly discharged employee monetarily whole under his employment contract; it should not provide a windfall."). *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (the purpose of a back-pay award under Title VII, 42 U.S.C. §2000 e-5(g), is "to make persons whole for injuries suffered on account of unlawful discrimination"). The Third Circuit itself recognized in *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) that the make-whole objective "should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases." Applying that principle, the Court in *Rodriguez* held that an employer is entitled to a credit against an ADEA back pay award for the full amount of plaintiff's earnings from other employment in the period after his illegal termination:

> "[A] victim of employment discrimination is entitled to be restored to the economic position he would have occupied but for the unlawful discrimination. The only provision in ADEA authorizing more favorable pecuniary relief stipulates liquidated damages be calculated on the basis of the underlying compensatory

12. The argument has been rejected that by failing to specify deductions from back-pay awards — as is done in Title VII, 42 U.S.C. §2000 e-5(g) — Congress did not intend to allow appropriate deductions under the ADEA. *See Rodriguez v. Taylor*, 569 F.2d 1231, 1243 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

award in the event of a willful violation. By not setting off Mr. Rodriguez's earnings during the interim period, the district court's order affords him income from two jobs that he could not have simultaneously performed. Thus, the plaintiff was placed in a better economic position than he would have achieved had he not been discriminated against in the first place." 569 F.2d at 1243.

Reversing the trial court's exercise of discretion in applying these principles, the Third Circuit in this case has done just what *Rodriguez* disapproved — it has placed McDowell in a better economic position than he would have achieved if he had never been terminated by Avtex. It has further stripped the trial courts of all flexibility in calculating back pay awards to effectuate the purposes of the ADEA. The policies relied upon by the Third Circuit in reaching its result are irreconcilable with the make-whole purpose that guides back pay awards in other Circuits.

A. *THE RULE THAT THE DISTRICT COURT HAS NO DISCRETION TO DEDUCT PENSION PAYMENTS FROM AN AWARD OF BACK PAY UNDER THE ADEA OFFENDS THE ADEA MAKE-WHOLE OBJECTIVE*

The Third Circuit is the first court to hold that pension benefits paid to an employee after his termination may not, as a matter of law, be deducted from an ADEA back pay award. Because this ruling is a marked departure from precedent, and because it has such far-reaching consequences,[13] this Court should grant certi-

13. For example, the brief filed in this Court by Trans World Airlines, Inc. as Petitioner in *Trans World Airlines, Inc. v. Thurston*, *supra*, notes that the pilots involved in that case had been paid retirement benefits of approximately $1.1 million as of December 31, 1981. Brief for Petitioner at 13 n.6. Under the Third Circuit's ruling, TWA would not be allowed a deduction in that amount from its back pay liability even if the pilots were reinstated and treated for pension

orari on this issue.

The trial court in this case noted that the pension plan in question was wholly employer-funded, and that in reinstating McDowell, Avtex had agreed to restore his pension entitlements to the level they would have reached if he had never been terminated (A-3). Exercising its discretionary judgment, the district court concluded:

> "Under these circumstances, where the plaintiff has been paid pension benefits during the period of his discharge, which he would not have received except for his discharge, and he has been reinstated with his entitlement under the defendant's pension plan fully restored by the defendant's payments to that plan, the interim pension payments which the plaintiff has received should be deducted from the award of damages for back pay. *See, Hannan v. Chrysler Motors Corp.*, 443 F. Supp. 802, 805 (E.D. Mich. 1978); *Robb v. Chemetron Corp.*, 17 FEP Cas (BNA) 1535, 1542 (S.D. Texas 1978); *see also Tribble v. Westinghouse Elec. Corp.*, 508 F. Supp. 14, 16 (E.D. Missouri 1980)." (A-3 to A-4).

Reversing this exercise of discretion, the Third Circuit has directed that, as a matter of law, such pension plan payments are not deductible in computing back pay awards under the ADEA (A-19 to A-21).

Courts have heretofore uniformly deducted interim pension benefits from back pay awards under the ADEA. *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86-87 (2d Cir. 1983); *Orzel v. City Wauwatosa Fire Dept.*, 697 F.2d 743, 756 (7th Cir. 1983), *cert. denied*, ____U.S. ____, 104 S.Ct. 484 (1983); *Fariss v. Lynchburg Foundry*, ____ F. Supp. ____, 35 Fair Empl. Prac. Cas. (BNA) 852, 853 (W.D. Va. August 3, 1984); *Malloy v. City of Duquesne*, No. 83-2624 (W.D. Pa. March 9, 1984);

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purposes as if they had never been retired or received any benefits at all.

Schulner v. Jack Eckerd Corp., 572 F. Supp. 56, 59 (S.D. Fla. 1983); *Wise v. Olan Mills, Inc.*, 495 F. Supp. 257, 260 (D. Colo. 1980); *Tribble v. Westinghouse Electric Corp.*, 508 F. Supp. 14, 16 (E.D. Mo. 1980, *aff'd*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 1767 (1983);[14] *Hannan v. Chrysler Motors Corp.*, 443 F. Supp. 802, 805 (E.D. Mich. 1978); *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535, 1542 (S.D. Tex. 1978).

Similarly, at least two Courts of Appeals have held that severance pay received by an employee should be deducted from the back pay award. *EEOC v. Sandia Corp.*, 639 F.2d 600, 626 (10th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975). Another Circuit Court had held that vacation and sick leave benefits paid to a terminated employee should be deducted. *Naton v. Bank of California*, 649 F.2d 691, 700 (9th Cir. 1981). The Court in *EEOC v. Sandia, supra*, went so far as to hold that the district court had abused its discretion in failing to deduct the severance payment:

> "[T]he cases support the offsetting of severance pay since it is a payment made wholly by the employer; thus it is not a collateral benefit and moreover would not have been made if termination had not occurred

14. The *Tribble* Court reasoned as follows:
"Though plaintiff's pension benefits were vested, he had no entitlement to receive them while he remained in defendant's employ. Had plaintiff remained in defendant's employ he would not have received any benefits until mandatory retirement at age sixty five. By virtue of defendant's violation of the Act, plaintiff received [$6,840]. *Plaintiff's recovery should only return him to the financial position he would have enjoyed, but for the involuntary termination.* The jury properly included in its award the pecuniary loss suffered by plaintiff because he was not able to work at age sixty five and thereby maximize his pension benefits. As such, the 'interim' pension benefits must be deducted from the lost wages award as they are, on the circumstances of this case, virtually identical to severance pay." 508 F. Supp. at 16 (citations omitted; emphasis added).

and, therefore, goes beyond the damages necessary to place the claimants in a whole position." 639 F.2d at 626.

To support its ruling in the present case, the Third Circuit erroneously labels pension payments as "collateral" (A-19); erroneously rules that "collateral benefits" should not be deducted from back pay awards (A-19 to A-20); and, to support the foregoing, articulates policies which clearly conflict with the make-whole objective of the ADEA.

The Third Circuit's conclusion that the pension benefits in this case are "collateral" simply ignores the fact that the pension plan in question is wholly employer-funded (A-3). *See, e.g., Naton v. Bank of California,* 640 F.2d 691, 700 (9th Cir. 1981) (holding the collateral source rule inapplicable to vacation and sick leave benefits paid to the employee "because the Bank is the exclusive source of the benefits").

More importantly, identifying the source of a payment as "collateral" does not, even in the Third Circuit, lead to the conclusion that it should not be deducted. In *Rodriguez v. Taylor, supra,* 569 F.2d 1231 at 1238, the Court determined that the District Court should have deducted plaintiff's interim earnings from other employment — surely a benefit wholly "collateral" to the defendant. This reasoning is irreconcilable with the Third Circuit's decision in the present case.

The Third Circuit identified three policy reasons for non-deduction of pension benefits. First, it found that "pension plan benefits are designed to serve social policies independent of those served by back pay awards" (A-19). This observation is simply irrelevant to the "make-whole" objective which in other Circuits — and heretofore in the Third Circuit — has guided the calculation of back pay awards.

Second, the Third Circuit stated:

> "[A] rule proscribing [sic] the deduction of pension plan benefits would dilute the purpose of ending discrimination . . . ." (A-19).

If this is taken to mean that (where possible) ADEA back pay awards should be higher rather than lower, it appears to be bad law.[15] In any event, the Congressional statutory scheme utilizes liquidated damages to serve the function of deterring ADEA violations.

Third, the Third Circuit reasoned that since liquidated damages are awarded in an amount equal to back pay, Avtex would save two dollars — one dollar in back pay and one dollar in liquidated damages — for every dollar by which back pay was reduced (A-20-A-21). Although the Court characterized this as an "inequitable result," the same result obtains when an employee's back pay award is reduced by amounts the employee earns from other employment after his termination. *See Rodriquez v. Taylor, supra,* 569 F.2d at 1243. Yet no court has held that the effect of such a deduction is inequitable to the employee because he "loses" an equal amount in liquidated damages. The Third Circuit's decision in this case wrongly permits the liquidated dam-

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15. Among other consequences, such a rule increases the inducement to plaintiffs to seek windfall awards in federal court rather than accept the results of EEOC or state agency mediation. *See* 29 U.S.C. §626(b), in which Congress directed the EEOC to pursue "voluntary compliance with the requirements of this Act through informal means of conciliation, conference and persuasion." *See also Johnson v. Al Tech Specialties Steel Corp.,* 731 F.2d 143 (2d Cir. 1984), in which the Court held that punitive damages and damages for mental distress and the like are unavailable under the ADEA:

> "In an era of burgeoning federal case loads, Congress's intent to resolve as many discrimination disputes as possible in an agency proceedings rather than in law suits comports with sound principles of judicial administration. A system which would permit complainants potentially to recover considerably larger sums if they resist settlement and initiate litigation would undermine this central feature of both Title VII and the ADEA." *Id.* at 148.

ages award to dictate calculation of back pay, rather than vice versa as intended by the statute. *See* 29 U.S.C. §626(b).

The Third Circuit's ruling will have varying effects depending upon whether the employee is reinstated, whether his pension plan is restored, whether the plan itself is contributory or wholly-funded by the employer, whether the employee is vested or not, and whether the employee takes a deferred or lump sum payout upon his termination. If a plaintiff takes a lump sum distribution of his pension fund, the Third Circuit's non-deductibility rule would presumably penalize the employer by that full amount.

To best deal with the different types of pension plans and the various circumstances of individual cases, the decision to deduct pension benefits from a back pay award should be left to the district court's discretion — exercised (as Magistrate Hall did in this case) with the object of making the plaintiff whole.

B. *THE DECISION WHETHER TO DEDUCT UNEMPLOYMENT COMPENSATION BENEFITS FROM ADEA BACK PAY AWARDS SHOULD BE LEFT TO THE DISCRETION OF THE TRIAL COURT*

The Third Circuit's holding that the district court does not have the discretion to deduct unemployment compensation benefits from an ADEA back pay award is without precedent. Before this decision, the Courts of Appeals had uniformly held that Section 7(b) commits to the trial court's discretion the decision whether to make such deductions. *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 162 (7th Cir. 1981); *Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977).[16] *See also Boich v. Federal Mine*

16. The following district court decisions have deducted unemployment compensation from ADEA back pay awards: *Jacobson v. Pitman-Moore, Inc.*, 582 F. Supp. 169, 179 (D. Minn. 1984);

Safety & Health Review Commission, 704 F.2d 275, 287-87 (6th Cir. 1983) (Federal Mine, Health and Safety Act). The Third Circuit's decision has therefore created a conflict among the Circuits which this Court should resolve.

The present case is particularly suitable for review. At the trial level, Avtex did not rely on the proposition that employers generally fund state unemployment compensation programs. Rather, Avtex placed before the trial court a complete factual record of its contributions to the Virginia and Pennsylvania compensation funds during the pertinent time period, the decline in Avtex' work force during that period, and the payments to McDowell from those funds. This record demonstrated a close correlation between Avtex' contributions and the number of its employees laid off.[17] On this record, the trial court, be-

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NOTES *(Continued)*

Schulner v. Jack Eckerd Corp., 572 F. Supp. 56, 59 (S. D. Fla. 1983); *Gathercole v. Global Associates*, 560 F. Supp. 642, 648 (N.D. Cal. 1983), *rev'd on other grounds*, 727 F.2d 1485 (9th Cir. 1984); *Wilson v. Wehadkee Yarn Mills*, 32 Fair Empl. Prac. Cas. (BNA) 847 (M.D. Ala. 1983); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 712-13 (E.D. Wis. 1978); *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 633 (W.D. Va. 1977); *Chernoff v. Pandick Press, Inc.*, 440 F. Supp. 822 (S.D.N.Y. 1977); *Bishop v. Jelleff Associates*, 398 F. Supp. 579, 597 (D.D.C. 1974); *Schulz v. Hickok Mfg. Co., Inc.*, 358 F. Supp. 1208, 1217 (N.D. Ga. 1973).

17. The parties stipulated in the trial court that Avtex' unemployment tax rate in Pennsylvania — based by statute on the amount of unemployment compensation benefits paid to former Avtex employees, *see* 43 Pa. Stat. Ann. §281.1(d) (Purdon 1982) — increased from 2% in 1978 to 6.3% in 1982. The amount of unemployment tax paid by Avtex increased from $201,983 in 1978 to $549,101 in 1982. During the same period the total taxable wages earned by Avtex employees in Pennsylvania dropped from $10,099,154 to $8,715,904. Second Joint Stipulation of Fact ¶10. The parties further stipulated that Avtex' unemployment tax rate in Virginia — also based by statute on the amount of payments made to former Avtex employees, *see* Va. Code §§60.179—60.184.1 (1982 & Supp. 1983) — increased from 1% in 1978 to 9% in 1981. The amount of unemployment tax paid by Avtex to the Virginia fund

lieving it had discretion in the matter (A-4-A-5), deducted state unemployment compensation benefits (in the amount of $3,131.00) from the back pay award (A-5). At the same time, the trial court refused to deduct benefits McDowell had received from a federal program to which Avtex had not contributed (A-5).

Reversing, the Third Circuit ignored the unbroken line of ADEA decisions committing the decision to the trial court's discretion and elected to follow *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983), in which a split panel of the Third Circuit had adopted the position of three Circuits[18] that unemployment compensation benefits may not be deducted from Title VII back pay awards. However, even under Title VII there is a split in authority: four other Circuits leave to the trial court's discretion the decision whether to deduct unemployment compensation benefits from a Title VII back pay award. *See Merriweather v. Hercules, Inc.*, 631 F.2d 1161, 1168 (5th Cir. 1980); *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); [19] *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975) (without

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increased from $165,784 in 1978 to $1,071,315 in 1981. At the same time, the total taxable wages earned by Avtex employees in Virginia fell from $16,578,437 to $9,600,000. Second Joint Stipulation of Fact ¶11.

18. *See Brown v. A.J. Gerrard Manufacturing Co.*, 715 F.2d 1549, 1550 (11th Cir. 1983) (en banc) (per curiam); *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346-47 (9th Cir. 1983) (per curiam); *EEOC v. Ford Motor Co.*, 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds*, 458 U.S. 219 (1982), *adhered to original position on remand*, 688 F.2d 951, 952 (4th Cir. 1982) (per curiam). *Accord, Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 627-28 (6th Cir. 1983) (Hoffman, J., dissenting), *cert. denied*, ___ U.S. ___, 104 S. Ct. 2151 (1984).

19. Affirming the trial court's deduction of public assistance benefits from a Title VII back pay award in that case, Judge Oakes observed that "*we are not in the business of redistributing the wealth beyond making the victim of discrimination whole.*" 542 F.2d at 592 (emphasis added).

discussion), *aff'd in part, vacated in part on other grounds*, 434 U.S. 136 (1977); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969).

This Court's most pertinent holding, announced in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1950), is that it lies within the discretion of the NLRB whether to deduct unemployment compensation benefits from back pay awards under the National Labor Relations Act. As detailed above, the Circuits are increasingly divided as to the applicability of this rule to ADEA and Title VII back pay awards.

The Third Circuit's ruling in the present case offends the ADEA make-whole objective because McDowell has been placed in a better position than he would have occupied had he never been terminated. Far from undercutting the purposes of the ADEA, the trial court's deduction of unemployment compensation in this case is faithful to the statute's make-whole objective which renders irrelevant the issue whether the employer pays less than he would have paid had the plaintiff had not received unemployment compensation. The goal to be achieved is restoration, not punishment. *Cf. Craig, supra*, 721 F.2d at 86 (Seitz, J. dissenting) ("by providing only a make-whole remedy [under Title VII] Congress has made the windfall issue irrelevant"); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) ("back pay [under Title VII] is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful economic practice"). The Third Circuit in *Craig* in fact acknowledged that the collateral benefit rule "may have somewhat punitive undertones, as it focuses on what the defendant should pay rather than what the plaintiff should receive." 721 F.2d at 83.

The Third Circuit in this case also failed to recognize that variations in state law relating to unemployment taxation and the differences in the level of benefits paid to

terminated employees will prevent its ruling from producing uniformity in economic restoration of injured plaintiffs, even within a Circuit. Committing the deductibility question to the trial court's discretion, to be exercised on the basis of the record presented by the parties, best accommodates the make-whole objective of the ADEA. As this Court has recognized in the context of Title VII back pay awards:

> "The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, *while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.*" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-22 (1975) (emphasis added).[20]

In this case, the trial judge took careful account of the source of McDowell's unemployment compensation. The court deducted the portion that came from the state unemployment funds to which Avtex contributed, and refused to deduct the portion that was funded by the federal government without any contribution by Avtex. The court's exercise of its discretion under Section 7(b) was made with awareness of the ADEA's remedial objective and fairly accommodated the interests of employer and employee. The Third Circuit's ruling deprives the trial court of the ability to fashion a back pay award that serves the ADEA's make-whole remedial objective and fairness in particular circumstances. It should be reviewed by this Court.

---

20. Recent rulings by several Courts of Appeals which permit recovery of front pay in lieu of reinstatement have emphasized that the purpose of the ADEA "is to make people whole and that which makes people whole is a matter for the discretion of the trial court under the facts and circumstances of the individual case." *Davis v. Combustion Engineering, Inc.*, ___ F.2d ___, 35 Fair Empl. Prac. Cas. (BNA) 975,980 (6th Cir. 1984) (citing *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982). *See also, Whittlesley v. Union Carbide Co.*, ___ F.2d ___, 35 Fair Empl. Prac. Cas. (BNA) 1089, 1091-92 (2d Cir. 1984).

CONCLUSION

For the reasons set forth herein, Petitioner Avtex Fibers, Inc. respectfully requests that a writ of certiorari issue to review the opinion and judgment of the Third Circuit.

Respectfully submitted,

Thomas A. Allen
1234 Market Street, 17th Floor
Philadelphia, PA 19107
(215) 854-7064

Counsel of Record for
Avtex Fibers, Inc.

LeRoy E. Perper
Brent S. Gorey
Peter J. Mooney

WHITE AND WILLIAMS
Of Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT McDOWELL	:	CIVIL ACTION
	:	
v.	:	FILED MAY 20, 1983
	:	
AVTEX FIBERS, INC	:	NO. 81-4822

MEMORANDUM AND ORDER

WILLIAM F. HALL, JR. MAY 20, 1983
UNITED STATES MAGISTRATE

In a bifurcated trial of this action brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA), the question of whether the plaintiff's discharge by the defendant violated the ADEA was tried to a jury which returned a verdict for the plaintiff on November 19, 1982. By stipulation the issue of damages for the unlawful discharge has been submitted to the court. The parties filed Joint Stipulations of Fact on January 12, 1983 and February 10, 1983 in which they agree on certain items of damages to which the plaintiff is entitled.

The plaintiff asks that he be awarded lost earnings or "back pay," measured generally as the amount which he would have earned had he not been unlawfully discharged, and he asks that he be awarded an additional equal amount as "liquidated damages" to which the employee is entitled for "willful" violations of the ADEA, pursuant to Section 626(b).

In December of 1982 the defendant offered to reinstate the plaintiff, and that offer was accepted in January of 1983. The parties have stipulated that from his termination in January of 1980 through January of 1983, the plaintiff would have earned $97,584.00 in salary

from the defendant had he continued to be employed by the defendant.

The parties have stipulated that his salary as of January of 1980 was $2,445.00 per month and that he would have received a 7% raise effective August 1, 1980, making his salary $2,615.00 per month, a 7% raise on August 1, 1981, making his salary $2,795.00 per month, and a 7% raise effective August 1, 1982, making his salary $2,993.00 per month. Thus the salary which he would have earned from the defendant is as follows:

1980 (11 months)	:	$27,745.00
1981 (12 months)	:	32,295.00
1982 (12 months)	:	34,551.00
1983 (1 month)	:	2,993.00
		$97,584.00

The defendant has conceded that the plaintiff is entitled to damages for lost health benefits in the amount of $280.00, making the amount of total damages for back pay and lost benefits $97,864.00.

The parties have also stipulated that upon the plaintiff's termination he received payments of $3,054.00 representing pay for vacation, and $1,222.50 representing two weeks termination pay, for a total of $4,276.50, which must be deducted from any award of damages for back pay as follows:

$$\begin{array}{r} \$97,864.00 \\ -\ 4,276.50 \\ \hline \$93,587.50 \end{array}$$

According to their stipulation the plaintiff was gainfully employed elsewhere during the period after his discharge by the defendant. He was paid $13,267.50 in 1980 and $1,825.00 in 1981 by Dunhill. He was paid $2,464.36 in 1981 by Chemservices. In 1982, Resource Technology Services, Inc. paid him $7,732.39, and in

1983 it paid him $1,500.00. The parties stipulate that these interim earnings are to be deducted from the award of damages for back pay:

$93,587.50
–26,789.25
$66,798.25

The defendant contends that the award of damages for back pay should be further reduced by the amount of $16,074.24 which the plaintiff received as pension payments upon his discharge, at the rate of $502.32 per month starting June 1, 1980, for thirty-two payments, and that it should also be reduced by the amount of $13,901.00 which he received as unemployment compensation benefits after his discharge by the defendant.

It has been stipulated by the parties that the pension payments which the defendant seeks to have deducted from the award for back pay were made from a pension plan to which the defendant made payments without contribution by the plaintiff. It has been further stipulated that in re-employing the plaintiff, the defendant will take the necessary steps so that the plaintiff's pension benefits will be the same as if his employment with the defendant had not been interrupted by the discharge, including making whatever contribution to the pension plan is necessary in order to achieve that result.

Under these circumstances, where the plaintiff has been paid pension benefits during the period of his discharge, which he would not have received except for his discharge, and he has been reinstated with his entitlement under the defendant's pension plan fully restored by the defendant's payments to that plan, the interim pension payments which the plaintiff has received should be deducted from the award of damages for back pay. *See, Hannan v. Chrysler Motors Corp.*, 443 F. Supp. 802, 805 (E.D. Michigan 1978); *Robb v.*

Chemetron Corp., 17 FEP Cas (BNA) 1535, 1542 (S.D. Texas 1978); *See also, Tribble v. Westinghouse Elec. Corp.*, 508 F. Supp. 14, 16 (E.D. Missouri 1980). The plaintiff's award of damages for back pay is thus subject to deduction of the pension payments which he received during the period of his discharge as follows:

$66,798.25
–16,074.24
$50,724.01

In their Second Joint Stipulation of Fact filed on February 10, 1983 the parties agree that the plaintiff's unemployment compensation benefits were derived from three main sources. They have stipulated as follows:

> Mr. McDowell's unemployment compensation benefits were paid in part by the Commonwealths of Virginia and Pennsylvania from their regular unemployment compensation funds, and in part by the United States Government pursuant to the Trade Act of 1974, 19 U.S.C. §2101 et seq. The specific amounts are as follows:

Time Period	State Unemployment Compensation Benefits	Federal Benefits	Total
2/80-6/80. . . .	$1,220 (Virginia)	$ 2,606	$ 3,826
2/81-10/81 . .	$1,911 (Pennsylvania)	$ 8,164	$10,075
Total	$3,131	$10,770	$13,901

Thus the state funded unemployment compensation benefits which the plaintiff received following his discharge totaled $3,131.00 to which, according to the parties stipulation, the defendant made contributions. The balance, $10,770.00 were federally funded from the U.S. Treasury without contributions from the defendant. *See* 19 U.S.C. §§2292, 2313.

The decision whether to deduct unemployment compensation benefits received by the plaintiff from the amount awarded as damages for back pay in an action pursuant to the ADEA is entrusted to the discretion of the court. *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665

F.2d 149 (7th Cir. 1981); *Marshall v. Goodyear Tire and Rubber Co.*, 554 F.2d 730 (5th Cir. 1977). In exercising that discretion in this case, I considered the extent to which the unemployment compensation benefits received by the plaintiff were clearly derived from a collateral source, i.e. a source wholly independent of the defendant. *See, Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981). Of the benefits which the plaintiff received, those paid from state unemployment compensation funds are not clearly wholly independent of the defendant in that the defendant was a contributor to those funds. In contrast, the benefits which the plaintiff received pursuant to the Trade Act of 1974, are from a clearly collateral source and a deduction of the amount of those benefits will not be made. The award of damages for back pay will therefore be reduced by the deduction of unemployment compensation benefits received by the plaintiff as follows:

$$\begin{array}{r} \$50,724.01 \\ -\ 3,131.00 \\ \hline \$47,593.01 \end{array}$$

The plaintiff has also requested the award of "liquidated damages." The prerequisites to the award of liquidated damages in an ADEA case are prescribed by 29 U.S.C. §626 which provides, in subsection (b), in pertinent part, that the provisions of the ADEA shall be enforced in accordance with the powers, remedies and procedures provided in the Fair Labor Standards Act, 29 U.S.C. §216(b). Section 216(b) of that act provides, in pertinent part, that a violating employer: "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." Section 626(b) authorizes the award of liquidated damages as that term is used in Section 216(b). Section 626(b) provides that "amounts owing to a person as a result of a violation of

the chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* that liquidated damages shall be payable only in cases of willful violations of this chapter."

Thus, in order for the plaintiff to be awarded liquidated damages, it must be found that his discharge was willful. The aforementioned sections supply no definition of willful; however, the Court of Appeals for the Third Circuit has provided the definition which must be applied here. In *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), the Court ruled at page 283 that

> [C]ongress did not intend to restrict the meaning of "willful" . . . to intentional violations of ADEA. It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences.

In affirming the award of liquidated damages the Court rejected the defendant's contention that the District Court erred in charging that willfulness required a showing that the discharge was done intentionally, deliberately and knowingly. Although the court held that the trial court's charge placed a higher burden on the plaintiff than required in establishing willfulness, it found no reversible error in the trial court's jury charge, apparently because the plaintiff prevailed despite the higher burden imposed upon him.

Applying the definition supplied in *Wehr v. Burroughs, supra* the issue here is whether the discharge of the plaintiff was because of age and was voluntary and not accidental, mistaken or inadvertent. (Alternatively, the issue can be stated in terms of whether the plaintiff's discharge was precipitated in reckless disregard of its consequences.)

The jury found, based on the evidence presented, that the plaintiff's discharge was because of age. Upon a thorough review of that evidence, I find no basis for concluding that the plaintiff's discharge was not voluntary and that it was accidental, mistaken or inadvertent. I find, therefore, that his discharge was willful within the meaning of the ADEA and that he is entitled to liquidated damages measured as an amount equal to his net back pay. Accordingly, the plaintiff is awarded liquidated damages in the amount of $47,593.01.

The terms of the plaintiff's reinstatement by the defendant are set out in an exchange of correspondence between counsel, which has been marked by them as exhibits A, B and C, copies of which are attached to this Memorandum and incorporated by reference, and those terms are further set out in their Joint Stipulations of Fact filed January 12, 1983 and February 10, 1983. The parties have stipulated that the plaintiff's salary upon reinstatement is to be at the rate of $2,993.00 per month, the rate of his salary effective August 1, 1982. In addition, the parties have stipulated that in reinstating the plaintiff the defendant will take the necessary steps so that the plaintiff's pension benefits will be the same as if he had not been discharged in January of 1980, but had instead been retained as an employee through the present. They further stipulate that the plaintiff, as an employee 60 years old with 30 years of service, etc., will be included within the actuarial assumptions, based on factors including the current assets of the fund, the number of employees, their length of service, their age, market conditions, and other factors, which determine the defendant's contribution to the pension plan.

An implementing order is attached hereto.

Alice W. Ballard, Esquire
Samuel and Ballard
4013 Chestnut Street
Philadelphia, PA 19104

December 22, 1982

Re: *McDowell v. Avtex Fibers, Inc.*

Dear Alice:

Irrespective of whether the issues of back pay, etc., are settled or tried, and irrespective of whether either party appeals any issue in the above case, Avtex is offering to reinstate Mr. McDowell at a comparable salary and position to what he had before the reduction in force in January of 1980.

Accordingly, it would be helpful to Avtex to know what Mr. McDowell's plans are in this respect — in particular, when he will be moving back to Front Royal and coming to work.

Thank you.

Very truly yours,

WHITE AND WILLIAMS

By
Thomas A. Allen

Thomas Allen, Esquire
White & Williams
1234 Market Street
17th Floor
Philadelphia, PA 19107

BY HAND

January 3, 1983

Re: *McDowell v. Avtex Fibers, Inc.*

Dear Tom:

This will respond to your letter of 12/22/82 about Mr McDowell's reinstatement as an Avtex employee.

As I'm sure you can understand, we have some doubts about the *bona fides* of the reinstatement offer, given the position taken by Avtex on the reinstatement question in its pre-trial briefs. However, if certain assurances (described below) are forthcoming from Avtex, and if good faith is established, Mr McDowell will be in a position to start working at Front Royal one month after the reinstatement terms are agreed to. The requested assurances are as follows:

(1) Mr McDowell's job will be that of a professional chemist in the R & D Department, performing work comparable to that being carried out by others of that category;

(2) Mr McDowell's salary will be an amount equal to his prior salary, plus, at a minimum, the increases received by the still-employed R & D professionals who have had the lowest total increase since Mr McDowell's departure. This salary agreement is without prejudice to our claim before Judge Hall that Mr McDowell is entitled to constructive increases in excess of this minimum;

(3) Mr McDowell will be entitled to all existing Avtex benefits at their current levels as if he had been continuously employed;

(4) Avtex will supply relocation assistance to enable Mr. McDowell to establish a residence for himself in Front Royal (through the purchase of a small house or condominium), and to sell his currently-owned house without loss to himself;

(5) Avtex must assure Mr McDowell that he will not be laid off from his R & D assignment again, unless the professional staff there is reduced below five (5) in number, and there is no possibility of his being absorbed into a plant position at Front Royal or Lewistown. Alternatively, we would accept a minimum guarantee of two years of employment, with regular, at-will status thereafter, equivalent to the position he would have been in had he worked continuously until 1985;

(6) Mr Hettich will make his best efforts to overcome what he characterized as communications problems with Mr McDowell.

I do hope that these assurances can be made, so that Mr McDowell can enjoy the restoration of his earning power and professional role. Of course, this letter is sent without waiver of our right to argue that the reinstatement offer is not *bona fide,* and that front pay is more appropriate.

Sincerely,

Alice W. Ballard, Esq.

854-7064 January 7, 1983
HAND DELIVERY
Alice W. Ballard, Esquire
4013 Chestnut Street
Philadelphia, PA 19104
RE: McDowell vs. Avtex
Dear Alice:

This is in response to your letter of January 3, 1983 requesting assurances from Avtex with respect to its reinstatement offer. I will respond to your paragraphs by number.

1. Agreed.
2. Agreed.
3. Agreed.
4. It is impossible to tell what would be requested in this regard, were Avtex to state a blanket agreement. In any event, Avtex has already helped Mr. McDowell buy one house, which he still owns (in addition to his house in West Chester). Avtex is willing to pay for the movement of Mr. McDowell's household goods, plus the expense of a motel for a reasonable period (three weeks) for Mr. McDowell to find a place to live.
5. Your second alternative is agreeable — i.e. a minium guarantee of two years of employment — with the caveat, as a minimal protection to Avtex in this situation, that Mr. McDowell must behave and perform his job in a professional manner.
6. Agreed. Of course, this is a two-way street, and it is presumed that Mr. McDowell will make similar efforts.

Since I started to dictate this letter, you and I have discussed these matters by telephone.

We look forward to your client's response.

Very truly yours,
WHITE AND WILLIAMS

By
Thomas A. Allen

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1434 and 83-1455

McDOWELL, ROBERT,
Appellant in No. 83-1455

v.

AVTEX FIBERS, INC.,
Appellant in No. 83-1434

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 81-4822)

Argued March 8, 1984
Before: ALDISERT, HIGGINBOTHAM and PECK,*
Circuit Judges.
(Filed July 12, 1984)

THOMAS A. ALLEN (Argued)
PETER J. MOONEY
WHITE AND WILLIAMS
1234 Market Street
17th Floor
Philadelphia, PA 19107

Attorneys for Appellant, Cross-Appellee

---

*Honorable John W. Peck, United States Court of Appeals for the Sixth Circuit, sitting by designation.

ALICE W. BALLARD (Argued)
ANNA M. DURBIN
SAMUEL & BALLARD, P.C.
1500 Walnut Street
Suite 920
Philadelphia, PA 19102

Attorneys for Appellee, Cross-Appellant

OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge.*

This case arises from a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b)(1976 & Supp. IV 1980). Plaintiff/appellee Robert L. McDowell ("McDowell") initiated the underlying action against Avtex Fibers, Inc. ("Avtex"), alleging that his discharge violated the ADEA. A jury found in favor of McDowell on the issue of liability, but the issue of damages was submitted to Magistrate Hall[1] by stipulation of the parties.

---

1. This case was tried before Magistrate William F. Hall, Jr. pursuant to the parties' stipulation under 28 U.S.C. § 636(c)(1). The parties stipulated further that any appeal would be brought directly to this court. In Wharton-Thomas v. United States of America, 721 F.2d 922 (3d Cir. 1983), this court held that a magistrate does have the authority to enter a final, appealable judgment if the parties consent. Because the parties have consented in this case, we will consider Magistrate Hall's order final for purposes of this appeal.

   We will refer to this proceeding before the magistrate as the proceeding before the trial judge or trial court interchangeably throughout this opinion.

Magistrate Hall awarded McDowell lost earnings minus mitigation as compensatory damages and an equal amount in liquidated damages on the ground that Avtex's violation was willful.

Avtex appeals from that portion of the order awarding liquidated damages arguing that the trial court applied an incorrect legal standard in finding Avtex's violation to have been willful and that, in any event, the evidence was insufficient to support a finding of willfulness. McDowell in his cross-appeal challenges the trial court's deduction of unemployment compensation benefits and pension plan benefits from his back pay award.[2]

We believe that the trial court applied a proper legal standard in finding a willful violation of the ADEA and that the evidence was sufficient to support a finding of willfulness. We thus affirm the district court's order on this issue. With regard to the trial court's deduction of pension plan and unemployment compensation benefits from McDowell's back pay award, we find it improper; accordingly, we will reverse that portion of the order of the trial court and will remand this case for reconsideration of the damages question in a manner consistent with this opinion.[3]

I.

The principal issue before this court concerns the total amount of damages for which Avtex is liable. In presenting the issue of damages to the trial court, McDowell asked that he be awarded lost earnings or

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2. Avtex Fibers is the appellant in No. 83-1434 and cross-appellee in No. 83-1455. McDowell is the appellee in No. 83-1434 and cross-appellant in No. 83-1455.

3. We will grant McDowell's motion to supplement the issues on appeal and to file a supplemental brief on cross-appeal.

"back pay" measured generally as the amount which he would have earned had he not been unlawfully discharged. Seeking to mitigate damages for which it would have been liable, Avtex argued that, in addition to certain agreed upon reductions, the back pay award should be further reduced by the amounts received by McDowell as unemployment compensation benefits and pension plan benefits after his discharge by Avtex. The parties stipulated that the pension payments were derived from a pension plan to which Avtex had made payments without contributions from McDowell. Moreover, the parties stipulated that Avtex would pay into this pension plan so as to return McDowell's pension benefits to the level they would have reached but for the interruption of his employment due to his unlawful discharge. McDowell has been reinstated with his entitlement under the pension plan fully restored.

In addition to back pay, McDowell was awarded by the trial court an equal amount in the form of "liquidated damages." Such damages are proper if Avtex willfully violated the ADEA. Avtex argued, however, that the trial court erred in finding willfulness and that the evidence was insufficient to support a finding of willfulness.

II.

Mitigation of Damages

A. Unemployment Compensation Benefits

We will address first McDowell's challenge to the trial court's deduction of unemployment compensation benefits from his back pay award. Without benefit of this court's decision in *Craig v. Y & Y Snacks, Inc.*, ("*Craig*") 721 F.2d 77 (3d Cir. 1983), the trial court

reasoned that the propriety of deducting unemployment compensation benefits from McDowell's back pay award under ADEA is entrusted to the discretion of the trial judge. Accordingly, the trial court exercised its discretion and found the deduction of unemployment benefits to be appropriate.

After the trial court decided this case, this court confronted an identical issue in *Craig, id.*, brought under Title VII. In *Craig*, this court aligned itself with the Fourth, Ninth and Eleventh Circuits and adopted the rule that unemployment benefits may not be deducted from a Title VII back pay award. *Id.* at 85; *see Brown v. A.J. Gerrard Manufacturing Co.*, 715 F.2d 1549, 1550 (11th Cir. 1983)(in banc)(per curiam); *Kauffman v. Sidereal Corp.*, 695 F.2d 343, 346-47 (9th Cir. 1982)(per curiam); *EEOC v. Ford Motor Co.*, 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds*, 458 U.S. 219 (1982), *adhered to original position on remand*, 688 F.2d 951, 952 (4th Cir. 1982)(per curiam).

Although *Craig* concerned a Title VII case, we can find no persuasive reason for reaching a different result simply because this case involves an ADEA violation rather than a Title VII violation. There is no legislative history or case law speaking to this precise issue. Instead, similarities between Title VII and the ADEA and this court's reasoning in *Craig* require a holding in this case that unemployment compensation benefits may not be deducted from an ADEA award.

As the Supreme Court noted in *Lorillard v. Pons*, 434 U.S. 575, 584 (1978),

> [t]here are important similarities between the two statutes, to be sure, both in their aims - the elimination of discrimination from the

> workplace - and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.[4]

Thus, while fashioning a rule to further the ends of Title VII, the majority stated in *Craig* that the deduction of unemployment compensation from a back pay award may not be left to the discretion of the trial court. Accordingly, it declared that back pay is "the presumptive remedy for unlawful employment." *Craig*, 721 F.2d at 85.

The majority in *Craig* reasoned that permitting the deduction of unemployment compensation benefits would undercut Title VII's purpose of ending discrimination to the extent that the back pay award is reduced by unemployment compensation. Moreover, the majority relied on Title VII's purpose of compensating injured victims in a "make whole" fashion when it forbade the unemployment compensation deduction. *Id.* at 84. It quoted with approval the Fourth Circuit's reasoning that

> [a]wards of back pay under Title VII should not be affected by a system of compensation which is designed to serve a wholly independent social policy. To decide otherwise would undercut to some degree the corrective force of a Title VII back pay award.

---

4. Title VII with respect to race, color, religion, sex or national origin, and the ADEA with respect to age make it unlawful for an employer "to fail or refuse to hire or to discharge any individual," or otherwise to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," on any of those bases. 42 U.S.C. § 2000e-2(a)(1) (1976); 29 U.S.C. § 623(a)(1) (1982). *Compare* 42 U.S.C. § 2000e-2(a)(2)(1970 & Supp. V 1975), *see* Rule 3.2(c) *with* 29 U.S.C. § 623(a)(2) (1982).

Id., quoting EEOC v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981).

The majority also reasoned that enunciating a rule of law would "foster uniformity in applying the back pay remedy" and would "avoid the conflicting results reached when such an issue is left to the discretion of the district courts, which may differ in their individual resolution of the legal and policy questions." *Craig*, 721 F.2d at 85.

The majority in *Craig* thus adopted the rule that unemployment compensation benefits may not be deducted from a Title VII back pay award. They adopted this rule even though under Title VII back pay itself is considered a discretionary remedy. *Lorillard v. Pons*, 434 U.S. at 584; *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Under the ADEA, however, back pay is not a discretionary award. Unlike Title VII, the ADEA mandates that an employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages . . ." while preserving no discretion for the district court in this regard. 29 U.S.C. § 216(b). As the Supreme Court indicated in *Lorillard v. Pons*, 434 U.S. at 584,

> the ADEA incorporates the FLSA provision that employers "shall be liable" for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion, *see Albemarle Paper Co. v. Moody*, 422 U.S. at 421 (footnote omitted).

In our view the reasons supporting this court's decision concerning Title VII in *Craig* apply even more so to this case involving the ADEA. Indeed, as stated above, while the ends of the two statutes are virtually identical, the ADEA back pay awards, unlike Title VII

back pay awards, are not discretionary. Thus, we conclude that unemployment compensation benefits, even if supported by contributions by the employer, may not be deducted from an ADEA back pay award. *See Craig*, 721 F.2d at 85; *Brown v. A.J. Gerrard Manufacturing Co.*, 715 F.2d at 1550.

B. Pension Plan Benefits

Having decided that unemployment compensation benefits may not be deducted from ADEA back pay awards, we next turn to the question of whether the deduction of pension plan benefits should be treated differently from the deduction of unemployment compensation benefits. We believe that these two forms of employee benefit plans are indistinguishable for the purpose of deciding this case.

Here, pension plan benefits, like unemployment compensation benefits, are collateral benefits. Both unemployment compensation benefits and pension plan benefits are designed to serve social policies independent of those served by back pay awards. The employer contributes to both forms of benefits either directly or indirectly.

Not only should both benefits be treated identically because of these similarities, but the reasons set forth in *Craig* for precluding the deduction of unemployment compensation benefits from Title VII back pay awards also support our decision not to allow the deduction of pension plan benefits even though the wrongful termination together with vested rights in the benefits made the employee eligible for the benefits. Just as with unemployment compensation benefits, a rule proscribing the deduction of pension plan benefits would dilute the purpose of ending discrimination. "[t]o the extent that a back pay award is reduced by [pension plan benefits] . . ." *Craig*, 721 F.2d at 84 (analyzed in terms of Title VII and unemployment

compensation benefits). Moreover, "awards of back pay under [the ADEA] should not be affected by a system of compensation which is designed to serve a wholly independent social policy." *Craig, id., quoting Ford Motor Co.*, 645 F.2d at 196 (analyzed in terms of Title VII). Finally, "[t]o decline to deduct state [pension plan benefits] in computing back pay is not to make the employees more than whole . . . . Since no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."[5] *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951)(emphasis in original)(analyzed in terms of the NLRA and unemployment compensation benefits).

More importantly, deducting pension benefits received by McDowell from his back pay award could potentially reduce the amount in liquidated damages to which he otherwise could be entitled while benefitting the employer by giving it a windfall -- a result certainly not intended by the ADEA. This apparent inequitable result of mitigating the back pay award occurs because under the ADEA liquidated damages are measured by doubling the back pay award. *See* 29 U.S.C. § 216(b). Consequently, for every dollar deducted from back pay a dollar is deducted from the liquidated damages award; thus, the employer would end up paying two dollars less in total damages for every dollar McDowell

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5. We recognize that in those cases involving the NLRA, such as NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), the Supreme Court left it to the discretion of the NLRB to determine whether credit should be given for unemployment compensation benefits. However, the Court's rationale in approving the Board's decision which refused to deduct unemployment compensation benefits seems equally applicable to this ADEA setup.

received in pension plan benefits or unemployment compensation benefits. Hence, even though McDowell would be made whole as to back pay (that is, he will not have suffered any net dollar loss), he would not get the full benefit of the liquidated damages provision.

The employer, on the other hand, would end up paying less back pay than he would have spent in actual pay but for the discrimination. Additionally, if liquidated damages are deemed appropriate he would pay less liquidated damages than he would have been liable for paying, but for the pension benefits which McDowell received.

For these reasons, in this case we believe unemployment compensation benefits and pension plan benefits should be treated identically with regard to the propriety of deducting them from ADEA back pay awards. Thus, under the rule enunciated in this case, it would be improper for a court to permit either unemployment compensation benefits or pension plan benefits to be deducted from ADEA back pay awards. A different result would put us in conflict with *Craig* and the spirit of the ADEA.

III. Liquidated Damages

The final question which we must decide is whether the trial court applied an improper legal standard in finding Avtex guilty of a willful violation of the ADEA and therefore liable for liquidated damages. We believe that the trial court applied the correct standard in finding Avtex's violation of the ADEA to have been willful. Finally, we conclude that the evidence was sufficient to support a finding of willfulness. We therefore will affirm on this issue.

The ADEA states that its provisions shall be enforced in accordance with the powers, remedies and procedures provided in the Fair Labor Standards Act. *See* 29 U.S.C. § 626(b). Section 216(b) of the Fair

Labor Standards Act provides, in pertinent part, that a violating employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Section 626(b) provides that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b).

In *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), this court articulated the standard for determining whether a particular violation under the ADEA was willful:

> It is sufficient to prove that the company discharged the employee because of age and that *the discharge was voluntary and not accidental, mistaken, or inadvertent.* In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences.

Id. at 283. (emphasis added).

It is conceded that the trial court correctly used this statement as the governing precept. *See* Mem. Op. at 7, *reprinted in* App. at 13. In applying this precept, the court then stated that it could "find *no* basis for concluding that the plaintiff's discharge was *not* voluntary and that it was accidental, mistaken or inadvertent." *Id.* at 8, *reprinted* in App. at 14 (emphasis added). That the trial court stated its conclusion as a double negative is more a matter of literary style than a stumble into reversible error. Because the court correctly recognized the burden of

proof when announcing its choice of the controlling legal precepts, we are not willing to say that a reviewing court is required to conclude that a perhaps inartful linguistic form used to apply the precept demonstrated a fatal breach.[6]

Moreover, even accepting arguendo that the trial court was stating a burden, we are not inclined to reverse on this issue because of the distinction between the burden of persuasion and the burden of production. The Supreme Court distinguished these two burdens for Title VII cases in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Although the burden of persuasion, or proof, always rests with the plaintiff, once plaintiff establishes a prima facie case of unlawful discrimination, the burden of production, or going forth with the evidence, to rebut the presumption shifts to the defendant. "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* at 254. If, however, defendant presents sufficient evidence to rebut the presumption, the burden of production

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6. Avtex also contends that the record does not contain sufficient evidence to support an award of liquidated damages. Mr. McDowell introduced evidence that he was discharged while younger individuals were retained and that these individuals were less qualified than he. Moreover, he argued that Avtex's justifications for retention of these younger individuals were a mere pretext for discriminating against him on the basis of age. In addition, Mr. McDowell offered expert testimony concerning the statistical significance of Avtex's pattern of discharge which fell more heavily on older employees in the protected class. Finally, Mr. McDowell revealed information in retained employees' files which he argued demonstrated Avtex's preference for younger employees. We believe this evidence is sufficient to support a finding of willfulness.

returns to the plaintiff and merges with his burden of persuasion to prove intentional discrimination. *Id.* at 256. This court has applied this burden scheme in age discrimination cases arising under the ADEA. *See, e.g., Massarsky v. General Motors Corp.*, 706 F.2d 111, 117-18 (3d Cir. 1983).

The trial court's language can be interpreted as a determination that the defendant did not meet its burden of production, a burden imposed on it by *Burdine*. By stating that it could "find no basis for concluding that the plaintiff's discharge was not voluntary," it can be said that the trial court was merely recognizing defendant's silence in the face of the presumption of discrimination raised by plaintiff. The entry of judgment for plaintiff, therefore, was not only correct but mandated by *Burdine*.

We, thus, conclude that the court did not implicate the burden scheme and its choice of language, although perhaps ill-considered, was a matter of style. To the extent it may be argued that the court did implicate the burden scheme, we conclude that the trial court simply determined that the defendant failed to rebut plaintiff's prima facie case.

We will affirm the district court's finding of willfulness. We will reverse its finding concerning damages. Accordingly, we will remand this case solely for the purpose of applying *Craig* to the damages question in a manner consistent with this opinion.

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No. 84-578 (2)

In The

Supreme Court of the United States

October Term, 1984

AVTEX FIBERS, INC.,

Petitioner,

vs.

ROBERT L. McDOWELL,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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No. 84-578

In The

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October Term, 1984

AVTEX FIBERS, INC.,

Petitioner,

vs.

ROBERT L. McDOWELL,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Robert McDowell, having worked for Avtex Fibers, Inc. ("Avtex") as a professional chemist for more than 29 years, was fired by Avtex at age 57 on January 26, 1980 during a reduction in force. McDowell subsequently brought an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

He charged he had been discharged because of his age, and he sought reinstatement with full back pay and appropriate benefits, liquidated damages, costs, attorney's fees, and such other relief as the court deemed appropriate.

By stipulation and pursuant to 28 U.S.C. § 636(c)(1) the parties agreed to present the case to a magistrate and to a twelve person jury. Proceeding before the jury with respect to the question of liability, Mr. McDowell presented essentially four types of evidence to show he had been terminated because of his age:

1. Proof of his own qualifications to perform work that Avtex continued after his termination;
2. Proof that the justifications proferred by Avtex for retaining younger professionals instead of Mr. McDowell were pretextual and unworthy of credence;
3. Statistical proof that the older professionals were significantly more likely to be terminated than the younger professionals; and
4. Proof that Mr. Hettich, the person solely responsible for determining which employees should be laid off, and his managers had attitudes marked by a preference for youth.

In its defense Avtex disputed McDowell's version of the facts, arguing that McDowell had been terminated because he was less qualified than other employees, rather than because of his age. Avtex also presented its own statistics seeking to establish that the terminations implemented by Avtex did not reflect a discriminatory purpose. (JA 66-100).

The jury resolved these credibility disputes in McDowell's favor, finding that but for McDowell's age, Avtex would not have discharged him and that Avtex was thus liable under the ADEA.

Following the jury's issuance of its verdict, Avtex agreed to reinstate McDowell to a position comparable to that which he occupied prior to his termination, to pay him his prior salary augmented by the minimum increases he would have received had he remained at Avtex, and to restore his other employment benefits to the levels they would have reached had he remained at Avtex. (Pet. for Cert. A8-A11). The remaining damage issues were submitted to the magistrate.

The magistrate concluded that McDowell was entitled to $47,593.01 in back pay and an equal sum in liquidated damages. Certain of the magistrate's conclusions were not challenged by either party on appeal: his computation of the basic salary and health benefits McDowell should have received, and his subtraction from this figure of the termination pay, vacation pay, and interim earnings McDowell received. The magistrate also deducted, however, the amount of the state unemployment benefits McDowell had received upon termination,[1] and the pension plan payments McDowell received between the unlawful discharge and reinstatement. Both of these deductions were appealed by McDowell to the Third Circuit.

Finally, the magistrate concluded that as Avtex had willfully violated the ADEA, McDowell was entitled to

---

[1]The magistrate did not deduct those unemployment benefits which were federally funded without any contribution by the defendant. (Pet. for Cert. A4-A5).

liquidated damages in an amount equal to the back pay award. *See* 29 U.S.C. § 626(b). In determining whether Avtex had discriminated willfully the magistrate looked to the definition of "willful" provided by the Third Circuit in *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980). Stating:

> "Applying the definition supplied in *Wehr v. Burroughs, supra,* the issue here is whether the discharge of the plaintiff was because of age and was voluntary and not accidental, mistaken or inadvertent. (Alternatively, the issue can be stated in terms of whether the plaintiff's discharge was precipitated in reckless disregard of its consequences.)"
>
> "The jury found, based on the evidence presented, that the plaintiff's discharge was because of age. Upon a thorough review of that evidence, I find no basis for concluding that the plaintiff's discharge was not voluntary and that it was accidental, mistaken or inadvertent. I find, therefore, that his discharge was willful within the meaning of the ADEA and that he is entitled to liquidated damages measured as an amount equal to his net back pay."

(Pet. for Cert. A6-A7). Avtex appealed the finding of willfulness to the Third Circuit.

Ruling on the parties' cross-appeals, the Third Circuit held for McDowell on all three disputed issues. It found that the magistrate based his award of liquidated damages on the proper legal standard and that the evidence was sufficient to support his finding of willfulness. (Pet. for Cert. A13-A21). The Third Circuit determined however that the magistrate had erred in deducting the pension and state employment benefits from McDowell's back pay award. (Pet. for Cert. A13-21).

Avtex now petitions for a writ of certiorari on each of these three issues.[2] However, for the reasons set forth below it would be inappropriate for the Court to grant a writ of certiorari with respect to any of the questions formulated by Avtex.

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REASONS FOR DENYING THE WRIT

I. This Court Should Not Reach Out To Reassess A Definition Of "Willful Violation" Of The ADEA Which Is Consistent With the Statutory Language And Legislative History And Where Any Split Among The Circuits Is Irrelevant To The Facts Of This Case.

A. Under Any Of The Circuits' Definitions Avtex "Willfully" Violated The ADEA When It Fired McDowell Because Of His Age.

As Avtex argues and as this Court recognized by granting certiorari as to the "willfulness" question in *Trans World Airlines, Inc. v. Thurston*, No. 83-997, *cert. granted*,

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[2]Avtex presents the following questions for review:

"1. Whether a 'willful' violation of the Age Discrimination in Employment Act, and thus an entitlement to liquidated damages, may be established pursuant to a legal standard which requires no evidence that the defendant intentionally or recklessly violated the Act?

2. Whether the Court of Appeals erred in holding that pension benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?

3. Whether the Court of Appeals erred in holding that unemployment compensation benefits paid to the plaintiff after termination of employment may not, as a matter of law, be deducted from an award of back pay under the Age Discrimination in Employment Act?"

— U.S. —, 104 S. Ct. 1412 (1984),[3] the Circuits have used different terminology in seeking to define "willful" in the context of the liquidated damages provision of the ADEA. While it is not entirely clear how much these definitions differ in actual practice, they appear to set somewhat different standards for what the employer needs to have known, and the level at which he needs to have had such knowledge, to be found to have acted willfully. For example, with respect to what the employer needs to have known, some Circuits look to whether the employer deliberately, knowingly or voluntarily discharged plaintiff because of his age.[4] Other Circuits look instead to whether the employer was at some level aware the act was *governed* by the ADEA.[5] The language employed by two Circuits apparently looks to whether an employer was at some level aware of the *illegality* of his action.[6]

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[3]The Court heard argument on this case and on its cross appeal, on October 9, 1984.

[4]*See, e.g., Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); *Wehr v. Burroughs*, 619 F.2d 276, 283 (3d Cir. 1980).

[5]*See, e.g., Haskell v. Kaman Corp.*, — F.2d —, 35 Fair Empl. Prac. Cas. (BNA) 941 (2d Cir. 1984); *EEOC v. Prudential Federal Savings and Loan Association*, 741 F.2d 1225, 1233 (10th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981).

[6]*See Heiar v. Crawford County*, — F.2d —, 35 Empl. Prac. Dec. (CCH) ¶ 34,614 (7th Cir. 1984) ("plaintiffs must show that the [defendant] should have known it was violating the Act"); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (in dicta, while not purporting to decide the circumstances under which an employer's action would be held willful, the court quotes the definition of willfulness used in a criminal context.)

The Circuits also use different language to express the requisite level of knowledge for a finding of "willfulness." Some require conduct which is either knowing, voluntary or in reckless disregard to its consequences;[7] some look to whether the conduct was or should have been knowing;[8] others require conduct which is deliberate, intentional or knowing;[9] and one in dicta requires that the defendant have acted with "specific intent," that is the "bad purpose either to disobey or disregard the law."[10]

However, while the differences between these standards might, in certain factual circumstances, yield different answers to the question of whether an employer acted willfully, the standards all converge when applied to the facts of this case. The only defense put forward by Avtex in response to McDowell's charge of age discrimination was that in fact Avtex had been motivated by factors other than age, in particular its need to reduce the workforce and McDowell's relative lack of qualifications. The jury re-

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[7]*See, e.g., Airline Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983), *cert. granted sub nom., Trans World Airlines, Inc. v. Thurston*, No. 83-997, — U.S. —, 104 S. Ct. 1412 (1984); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Wehr v. Burroughs*, 619 F.2d 276, 283 (3d Cir. 1980).

[8]*See, e.g., Heiar v. Crawford County*, — F.2d —, 35 Empl. Prac. Dec. (CCH), ¶ 34,614 (7th Cir. 1984); *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982).

[9]*See, e.g., Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981).

[10]*Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (dicta).

jected this defense when it concluded that Avtex fired McDowell because of his age.[11]

Avtex now seeks to argue that although it fired McDowell because of his age, rather than for any valid reason, it did not act "willfully." However, Avtex presented no evidence to prove that although it fired McDowell because of his age, it did not do so "willfully." Thus, although Avtex makes a great deal of the theoretical distinction between knowingly discharging a person and knowingly violating the ADEA, (Pet. for Cert. at 14-15, 17-18), the distinction has no meaning given the facts of this case.

Nor does the determination of whether Avtex acted willfully turn on Avtex' level of knowledge when it terminated McDowell. The jury rejected Avtex' only profferred defense of good motive or lack of knowledge when it found Avtex terminated McDowell because of his age. Therefore, under any of the standards of knowledge, bad purpose, actual knowledge, attributed knowledge, or reckless disregard, Avtex acted willfully.

In sum, given the facts of this case it would be inappropriate for the Court to reach the issue of the proper standard for "willfulness" because under any of the proposed definitions, Avtex acted willfully.

---

[11]The magistrate had instructed the jury that:

> ". . . the plaintiff has the burden of establishing, by a preponderance of the evidence, that age was a 'detemina-tive factor' in the defendant's decision to discharge him in the sense that but for this age he would not have been discharged."

and that

> "the ultimate issue in this case is whether the plaintiff, personally, was discharged as a result of unlawful age discrimination."

(JA 197-98).

B. The Third Circuit's Definition Of Willfulness Is Consistent With The Legislative History Of The ADEA.

Defendant is incorrect when it repeatedly argues that the Third Circuit's definition of "willfulness" under the ADEA would "lead to an automatic award of liquidated damages" and is thus inconsistent with the legislative history of the ADEA. (*See* Pet. for Cert. at 14-15.) Plaintiff agrees that such an automatic entitlement would be improper given Congress' explicit provision that liquidated damages are only available where there has been a willful violation. 29 U.S.C. § 626(b). *See also Lorillard v. Pons,* 434 U.S. 575, 581 (1978). However, the Third Circuit standard creates no such automatic award.

In *Wehr v. Burroughs,* 619 F.2d 276 (3d Cir. 1980), the Third Circuit first articulated the standard applied both by the trial court and by the Third Circuit on appeal in this case:

> "It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences."

619 F.2d at 283.

Neither the trial court nor the Third Circuit interpreted this standard as creating an automatic entitlement to liquidated damages once the jury had made its finding of liability. Rather, both recognized that an independent review of the evidence was appropriate. The magistrate stated: "Upon a thorough review of that evidence, I find no basis for concluding that the plaintiff's discharge was

not voluntary and that it was accidental, mistaken, or inadvertent." (Pet. for Cert. at A-7). On appeal the Third Circuit criticized the magistrate's stylistic choice in using a double negative to describe the results of his independent evidentiary review, (Pet. for Cert. A22-A24), and performed its own independent review of the evidence, thereby implicitly endorsing the need for such independent review even though the jury had found Avtex liable.

Moreover, while it may be true that the limited nature of Avtex' defense in this case virtually assured a finding of willfulness once a finding of liability had been made against Avtex, this would not be so in many cases. If an employer can show it made a mistake when it violated the ADEA, liquidated damages would not be appropriate. For example, where an employer's defense to a charge of age discrimination is that the age limit set for a particular job was a bona fide occupational qualifiation (BFOQ), *see* 29 U.S.C. § 623(f)(1), a court might easily find the employer violated the ADEA but did not do so willfully.[12] Similarly, an employer might be held liable under the ADEA but not required to pay liquidated damages under the Third Circuit standard if the employer mistakenly thought it was observing the terms of a bona fide seniority system, *see* 29

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[12]*See, e.g., Heiar v. Crawford County,* — F.2d —, 35 Empl. Prac. Dec. (CCH) ¶ 34,614 (7th Cir. 1984), in which the Seventh Circuit reasoned that although the medical evidence did not support the county's claim that deputy sheriffs could be required to retire at age 55, the county did not act "willfully" because many laws actually require law enforcement officers to retire at age 55 and because the county did not realize when it discharged the officers that its medical evidence would turn out to be insufficient to establish a BFOQ.

U.S.C. § 623(f)(2), was terminating a bona fide executive or person in a high policy making position who was entitled to an immediate nonforfeitable annual retirement benefit, *see* 29 U.S.C. § 631(c) (1), or was terminating a person over the age of 70. *See* 29 U.S.C. § 631(a). Finally, if an employer was found to have violated the ADEA under a disparate impact theory, which required the plaintiff to show only that the employer's facially neutral standard nevertheless violated the ADEA because it had a disparate impact on persons over the age of 40, and was not justified by business necessity, the court might well find that the violation had not been willful.[13]

Nor does the Third Circuit's definition of willfulness conflict with any explicit legislative history defining this term. As many courts have recognized, Congress gave no specific direction as to how "willful" should be interpreted.

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[13]*Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), recognizes this distinction:

> "In finding under proper instructions, that Heublein had denied Goodman a promotion *because of* age, the jury necessarily concluded that Heublein's action was intentional. In a discriminatory treatment case, such as this, an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason. On the other hand, in a discriminatory impact case, where an employer acts on the basis of some standard that is shown, in practice, to have a disproportionate impact on some group identifiable by a characteristic such as age, a finding of liability will not inevitably mean that the employer discriminated intentionally."

Id. at 131 n.6. (emphasis in original). However the Second Circuit apparently failed to recognize that liquidated damages might be inappropriate in certain disparate treatment cases as well.

See, e.g., Kelly v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). Avtex' attempt to create such legislative history by construing a comment of Senator Javits in 1976 to characterize the liquidated damages provision as punitive in nature and then drawing upon Prosser's *Law of Torts* for the definition of punitive damages fails for several reasons. First, in passing the 1978 amendment to the ADEA the House Conference Report specifically stated that liquidated damages are compensatory rather than punitive. Describing the new damages provision the Report stated:

> "[I]t includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA."

H. Conf. Rep. No. 95-950, 95th Cong. 2d Sess. 13-14, *reprinted* in 1978 U.S. Code Cong. & Ad. News, 535.

The Report further explained that:

> "The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.' *Overnight Transportation Company v. Missel*, 316 (1942)."

Id.

This subsequent and explicit statement in a House Report certainly carries more weight than Senator Javits'

ambiguous remark in 1976. Moreover, the statement of Senator Javits relied upon by Avtex does not in fact characterize the liquidated damages as punitive. The Senator stated only that:

> "[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations and at the same time avoid the difcult problems of proof which would occur under a criminal provision."

113 Cong. Rec. 7076 (1976).

The mere fact that the liquidated damages measure might have been designed in part to encourage employers to comply with the ADEA does not mean it should be interpreted like a criminal statute.

In sum, the Third Circuit's standard for willfulness is consistent with the statutory language and the legislative history, and any differences with the other Circuits' standards are irrelevant to the facts of this case.

II. The Third Circuit's Determination That Unemployment And Pension Benefits May Not Be Subtracted From A Discriminatee's Back Pay Award Under The ADEA Is Consistent With The Statutory Language, Legislative History, And This Court's Determinations, And Does Not Create The Sort Of Conflict Among The Circuits Which Requires Resolution By This Court.

A. The Third Circuit's Rule Barring The Deduction Of Unemployment Insurance And Pension Payments From Back Pay Awards Does Not Create The Sort Of Conflict Among The Circuits Which, Spawning Uncertainty, Requires Resolution By This Court.

Avtex argues that the Third Circuit erred when, failing to bow to the magistrate's exercise of his discretion,

it held that unemployment compensation and pension payments could not be subtracted from the back pay award provided to a plaintiff who had prevailed under the ADEA. According to Avtex, such determinations may be rendered only by a trial court. Avtex further contends that the Supreme Court must take certiorari on these issues to resolve the split among the Circuits and to provide "the business community with much needed guidance." (Pet. for Cert. 18).

There is however no genuine conflict among the Circuits requiring resolution by this Court. No Court of Appeals has held that pension or unemployment payments *must* be deducted from a back pay award. Moreover, while several Courts of Appeals have permitted district courts to exercise their discretion in determining whether pension or unemployment benefit payments should be deducted from a back pay award,[14] the introduction of the Third Circuit's rule will not create uncertainty either as to how employers should act in order to comply with the ADEA or as to how back pay awards should be calculated under that Act.

The ADEA clearly prohibits discrimination on the basis of age and authorizes the use of back pay awards

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[14]Four Circuits have determined that the deduction of unemployment insurance benefits should be left to district courts' discretion. *See Syvock v. Milwaukee Boiler Mfg., Co.*, 665 F.2d 149, 162 (7th Cir. 1981); *Naton v. Bank of California*, 649 F.2d 691, 699-700 (9th Cir. 1981); *EEOC v. Sandia Corp.*, 639 F.2d 600, 624-25 (10th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977). The Seventh Circuit has similarly held that the question of whether pension benefits should be deducted is a matter for the trial court's discretion. *Orzel v. City of Wauwatosa Fire Dept.*, 677 F.2d 743, 756 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 484 (1983). *See also Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86-87 (2d Cir. 1983) (same).

and injunctive relief to enforce that prohibition. Therefore, the Third Circuit's adoption of a rule barring the deduction of unemployment insurance and pension payments from back pay awards will not make employers uncertain as to whether or not they may discriminate on the basis of age. Nor has Avtex argued that the Third Circuit rule would make employers uncertain as to how to conduct any other aspect of their business.

In fact, it is the rule proposed by Avtex, requiring deference to the trial court's discretion, which creates uncertainty. Neither Avtex nor the Circuit Courts which routinely defer to trial court damages calculations have clearly set forth any standards for the district court to following in exercising its discretion. Therefore, district courts have reached opposite conclusions for no apparent reason[15] and employers cannot easily predict how back pay awards will be calculated. By contrast the Third Circuit rule puts all employers on notice that they will be required to pay a full back pay award if they violate the ADEA.

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[15]For example, the following district courts determined that unemployment benefits should not be deducted but referred to no particular factual aspect of the case to support their decisions: *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 951 (D.Col. 1979); *Abron v. Black & Decker Mfg. Co.*, 439 F. Supp. 1095, 1115 (D. Md. 1977); *Inda v. United Air Lines, Inc.*, 405 F. Supp. 426, 435 (N.D. Cal. 1975). Similarly, the following district courts determined that employment benefits should be deducted but provided at most general policy arguments unrelated to the particular facts of the case to support their holdings: *Schulner v. Jack Eckerd Corp.*, 572 F. Supp. 56, 59 (S.D. Fla. 1983); *Gathercole v. Global Associates*, 560 F. Supp. 642, 648 (N.D. Cal. 1983), *rev'd on other grounds*, 727 F.2d 1485 (9th Cir. 1984); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 712-13 (E.D. Wis. 1978); *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 663 (W.D. Va. 1977).

In sum, were the Court to grant the writ of certiorari and to adopt the rule of deference to district court discretion sought by Avtex, it would not resolve employers' uncertainty as to how back pay awards will be calculated.

B. The Third Circuit's Prohibition On The Deduction Of Unemployment Insurance And Pension Payments From Back Pay Awards Is Consistent With The Statutory Language And Legislative History Of The ADEA And With The Determinations Of This Court.

Although neither the language nor the legislative history of the ADEA itself expressly address the issues of whether an employer should be permitted to deduct unemployment insurance and pension plan payments from the back pay award it is required to pay, the statutes upon which the ADEA was based indicate that such deductions are inappropriate. As this Court has held, the ADEA was modeled in large part upon Title VII, 42 U.S.C. § 2000e *et seq., see Lorillard v. Pons,* 434 U.S. 575, 584 (1978), and the back pay provision of Title VII was in turn "expressly modeled on the back pay provision of the National Labor Relations Act," ("NLRA"), *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (1975) (footnote omitted). It is thus appropriate to look for guidance to *National Labor Relations Board v. Gullet Gin Co.,* 340 U.S. 361, 364 (1951) in which the Supreme Court, interpreting the NLRA, upheld the NLRB's refusal to deduct unemployment benefits from the back pay award owed by an employer. The Court stated:

> "To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should

> be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."
>
> "But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. . . . We think these facts plainly show the benefits to be collateral."

National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361, 364 (1951) (citations omitted.) Moreover, while the *Gullett* decision deals expressly with unemployment insurance payments, its reasoning applies equally to pension plan payments. Like unemployment insurance payments, pension payments are made for a social purpose wholly distinct from that of compensating a victim of discrimination. *See Gullett,* 340 U.S. at 364. Similarly, although the pension payments were funded by the employer, this does not distinguish them from the unemployment insurance payments at issue in *Gullett* which the Court recognized were funded by employer taxes. *Id.*

The Third Circuit's prohibition on the deduction of unemployment insurance benefits and pension payments from ADEA back pay awards is also consistent with that statute's twin purposes of eradicating discrimination and making whole the victims of discrimination. In *Albe-*

marle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), the Court explained that Title VII's "primary objective," "equality of employment," requires an effective back pay award, noting that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Id.* As three Courts of Appeal besides the Third Circuit have held in the context of Title VII, permitting discriminating employers to lessen their back pay awards by the amount of the unemployment insurance their victims received would undercut the statute's antidiscriminatory purpose.[16] This reasoning is equally applicable to the ADEA. *See Lorillard,* 434 U.S. at 584. Employers will feel more free to discriminate if they know that they will be permitted to offset benefits designed for wholly separate social purposes against any back pay award they are ultimately required to pay. Permitting such offsets brings the back pay remedy closer to the injunctive remedy this Court has recognized would be insufficient to deter discrimination. *See Albemarle Paper,* 422 U.S. at 417.

Moreover, the necessity for effective back pay relief is implanted even more strongly in the ADEA than in Title VII. Whereas back pay is considered a discretionary award under Title VII, *Lorillard v. Pons,* 434 U.S. at 584, it is mandatory under the ADEA. *Id.* at 584 ("the ADEA

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[16]*Brown v. A.J. Gerrard Mfg. Co.,* 715 F.2d 1549, 1550 (11th Cir. 1983) (en banc) (per curiam); *Kauffman v. Sidereal Corp.,* 695 F.2d 343, 346-47 (9th Cir. 1982) (per curiam); *EEOC v. Ford Motor Co.,* 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds,* 458 U.S. 219 (1982), *reaffirming original position on remand,* 688 F.2d 951, 952 (4th Cir. 1982) (per curiam). The Third Circuit held that unemployment insurance payments could not be deducted from Title VII back pay awards in *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77 (3d Cir. 1983).

incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime").

Permitting employers to offset the unrelated unemployment insurance and pension payments also allows them to escape the liquidated damages provision of the ADEA. While 29 U.S.C. § 626(b) requires an employer who discriminates "willfully" to make an additional liquidated damages payment equal to the back pay award, the willful discriminator can avoid such a payment to the extent he can offset the back pay award with unemployment insurance or pension payments made for a wholly separate purpose. Therefore, while permitting the offset would benefit all discriminators, willful discriminators would receive double benefits.

As the language and reasoning of *Gullet* indicates, the Third Circuit rule is also consistent with the make-whole purpose of the ADEA. In the words of the Court:

> "Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."

340 U.S. at 364.

Given the existence of collateral benefits such as unemployment insurance, either the discriminator or the discriminatee will receive a windfall. If the discriminator is permitted to reduce his back pay obligation by the amount of the collateral benefit and perhaps an equal amount in liquidated damages, he will receive the windfall and will thus

have less incentive not to discriminate. On the other hand, if the discriminatee is allowed to collect the full back pay and liquidated damages award, even though she already received an unemployment insurance payment, it is not clear she will receive a true windfall. As the Supreme Court recognized in *Gullet,* the discriminatee may well have suffered collateral losses such that the award of the collateral benefit would not make her more than whole. 340 U.S. at 364.

Finally, Avtex has pointed to no statutory language, history, or purpose which supports the notion that trial courts should be permitted to exercise unbounded discretion in determining whether or not to deduct unemployment insurance and pension payments from back pay awards. The determination turns not on evidentiary or factual questions, perhaps best left to the trier of fact, but rather on interpretations of statutory language and legislative intent.[17] There is no reason to leave such decisions to the unbounded discretion of a trial court.

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[17]District courts exercising their discretion either to deduct the benefits or not to deduct them are basing their decisions on policy considerations rather than on factual differences between the cases. *See supra* note 15.

CONCLUSION

In sum, the writ of certiorari should not be granted. The Third Circuit's rule barring the deduction of unemployment insurance and pension payments from back pay awards does not create uncertainty as to how employers should conduct themselves and is consistent with the language, history and purposes of the ADEA.

Respectfully submitted,

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(3)

No. 84-578

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

AVTEX FIBERS, INC.,
Petitioner

v.

ROBERT L. MCDOWELL,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner Avtex Fibers, Inc. ("Avtex") respectfully submits the following in reply to two arguments raised in Part I of the Brief for Respondent Opposing Petition for Writ of Certiorari ("Brief for Respondent"), on the question of the appropriate legal standard for the award of liquidated damages under Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b).[1]

1. The arguments offered in Part II of the Brief for Respondent, on deductibility of pension benefits and unemployment compensation benefits from back-pay awards under the ADEA, are essentially those relied upon in the Opinion of the Third Circuit in this case

1. The Brief for Respondent (p. 12) relies upon legislative comments made in 1978, eleven years after passage of the ADEA *with* its liquidated-damages provision.[2] Directly on point is *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Just as in the present case, at issue in *Oscar Mayer* was an ADEA section[3] which was passed in 1967[4] and not amended in 1978.[5] With respect to the legislative comments[6] made in connection with the 1978 amendments to ADEA, this Court stated:

> "We are not persuaded. Senate Report No. 95-493 was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations . . . are in no sense part of the legislative history.' *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977). 'It is the intent of the Congress that enacted [the section], . . . that controls.' *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977)." 441 U.S. at 758.[7]

(A-15 to A-21), and were addressed in the Petition for Writ of Certiorari.

2. *See* Act Dec. 15, 1967, P.L. 90-202, 81 Stat. 602. The legislative history cited in the Petition for Certiorari (pp. 15-16) is from the Congress which passed ADEA in 1967. At p. 16 of the Petition, the citation "113 Cong. Rec. 7076 (1976)" is a typographical error; the correct citation is 113 Cong. Rec. 7076 (1967).

3. 29 U.S.C. §633(b).

4. Act Dec. 15, 1967, P.L. 90-202, 81 Stat. 602.

5. Act April 6, 1978, P.L. 95-256, 92 Stat. 189.

6. Senate Report No. 95-493, which was adopted in the Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 95-950, 9th Cong. 2d Sess. 13-14, reprinted in 1978 U.S. Code Cong. & Ad. News, 535 (the same Joint Explanatory Statement relied upon in the Brief for Respondent, p. 12).

7. As to the inutility of subsequent legislative comments, *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980).

ADEA's liquidated-damages provision, 29 U.S.C. §626(b), was passed in 1967 and not amended in 1978. The 1978 legislative observations cited at p. 12 of the Brief for Respondent should not be deemed persuasive.

2. The Brief for Respondent argues at pp. 7-8 that the acknowledged split among the Circuits[8] is immaterial because the jury in this case implicitly found that Avtex had willfully violated the ADEA. No authority is cited to support the proposition that pursuant to the jury instructions in this case, there was such an implicit finding. In an attempt to support that proposition, the Brief for Respondent suggests (pp. 7-8) that the jury in this case necessarily concluded that Avtex's proferred reasons for terminating McDowell were false. Two responses are in order.

First, the Courts in both *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983) and *Golomb v. Prudential Ins. Co. of America*, 688 F.2d 547 (7th Cir. 1982) held that a jury finding of liability, on instructions substantially the same as those in the present case,[9] did *not* amount to a finding that an employer's articulated reasons for the challenged action were false; rather,

> ". . . the employer's articulated reason may in fact have been true, but if age was also a determining factor in the employer's decision, the plaintiff has carried his burden of proof." *Golomb v. Prudential Ins. Co. of America, supra*, 688 F.2d at 551; see also *Hagelthorn v. Kennecott Corp., supra*, 710 F.2d at 82.

Accordingly, in the present case the jury did not necessarily reject the reasons put forward by Avtex[10] for terminating McDowell; they were instructed to find a vio-

8. Brief for Respondent, pp. 5-7.

9. *Compare* J.A. 197-99 with *Hagelthorn v. Kennecott Corp., supra*, 710 F.2d at 80 and *Golomb v. Prudential Ins. Co. of America, supra*, 688 F.2d at 549-50.

10. *See* Petition for Certiorari, pp. 5-6.

lation if they simply found it more likely than not that age "made a difference."[11]

Second, clearly there has never been a factual determination in this case that would satisfy the legal test set forth, for example, in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), where a distinction is drawn (for purposes of determining whether liquidated damages should be awarded) between an "unconscious" violation of the ADEA, and a violation with the intent to violate the ADEA. *Syvock, supra*, 665 F.2d at 155. In the present case where there was no direct evidence of age discrimination,[12] where in fact plaintiff argued "unconscious" age discrimination at trial,[13] and where the jury instructions required no finding as to Avtex's state of mind, the split among the Circuits is most certainly material.

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11. In addition to the jury instructions quoted at p. 8 n.11 of the Brief for Respondent, the jury in this case was instructed:

> "When I say that the plaintiff must establish unlawful age discrimination by a preponderance of the evidence, I mean that he must prove that it is more likely than not that age was a *determinative factor* in the defendant's decision to discharge the plaintiff. In order to be a determinative factor, the plaintiff's age need not be the *only* factor which influenced the defendant's decision to discharge him. It can be one among a number of factors which together caused the defendant to discharge him. However, the plaintiff must prove that it is more likely than not that this age factor made a difference in the defendant's decision to discharge him." (J.A. 198.)

12. *See* Petition for Certiorari, p. 6.

13. *See* Petition for Certiorari, pp. 6-7.

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